



Federal Communications Commission  
Washington, D.C. 20554

March 29, 2010

Rick Daysog  
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Honolulu, HI 96803

Raycom Media, Inc.  
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1201 Pennsylvania Avenue, N.W.  
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HITV License Subsidiary, Inc.  
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875 15<sup>th</sup> Street, N.W.  
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Institute for Public Representation  
c/o Angela J. Campbell, Esq.  
Georgetown University Law Center  
600 New Jersey Avenue, N.W.  
Washington, DC 20001

Re: FOIA Control No. 2010-130  
Request for Confidential Treatment

Dear Mr. Daysog and Counsel:

By this letter, we grant in part and deny in part a Freedom of Information Act ("FOIA") request for inspection of records ("FOIA Request") filed by Rick Daysog/Honolulu Advertiser relating to certain provisions contained in documents submitted to staff in connection with an October 7, 2009, Complaint and Request for Emergency Relief Regarding Shared Services Agreement Between Raycom and MCG ("Complaint") filed by Media Council Hawai'i ("Media Council") with the Commission. Additionally, with respect to a related request for confidential treatment filed by Raycom Media, Inc. ("Raycom") and HITV License Subsidiary, Inc. ("HITV"), licensee of station KGMB(TV), Honolulu, Hawaii, we determine that section 2.12 and Exhibit A of the Amended and Restated Limited Liability Company Agreement of KHNL/KFVE, LLC, and certain provisions contained in a Management Services Agreement between KHNL/KFVE, LLC and Raycom are entitled to confidential treatment under FOIA Exemption 4 and section 0.459 of the Commission's rules.<sup>1</sup>

**Background.** Media Council alleged in its Complaint, among other things, that a series of agreements between Raycom, ultimate parent of the licensee of stations KHNL(TV) and KFVE(TV), Honolulu, HI, and HITV, would result in an unauthorized transfer of control of station KGMB(TV) to Raycom, in violation of section 310(d) of the Communications Act of 1934 and section 73.3555(b) of the Commission's rules.<sup>2</sup> On October 23, 2009, Commission staff requested that Raycom and HITV "file executed versions of [an] Asset Exchange Agreement, Shared Services Agreement, Option Agreement,

<sup>1</sup> 5 U.S.C. § 552(b)(4); 47 C.F.R. § 0.459.

<sup>2</sup> 47 U.S.C. § 310(d); 47 C.F.R. § 73.3555(b) (2002).

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and the Lease Agreement.” On October 26, 2009, Raycom and HITV filed redacted versions of the following agreements: Amended and Restated Asset Exchange Agreement; Term Loan Note; Purchase Option Agreement; Shared Services Agreement; Studio Lease; Management Services Agreement; Amended and Restated Limited Liability Company Agreement of KHNL/KFVE, LLC; and Assignment Agreement. On November 9, 2009, Raycom and HITV filed unredacted versions of these agreements along with a Request for Confidential Treatment of the previously redacted provisions. Prior to receipt of the FOIA Request, Media Council filed an opposition to Raycom and HITV’s request for confidential treatment of any of the information at issue.

Mr. Daysog’s FOIA Request sought an unredacted copy of the Term Loan Note, an unredacted copy of the Asset Exchange Agreement, and an “[u]nredacted assignment agreement or option agreement ...between Raycom or KHNL/KFVE LLC and Ottumwa Media Holdings LLC.”<sup>3</sup> Pursuant to section 0.461(d)(3) of the Commission’s rules,<sup>4</sup> Raycom, HITV, and Media Council were served a copy of the FOIA Request and provided an opportunity to submit a response. Raycom and HITV filed a response to the FOIA Request on January 19, 2010. Mr. Daysog filed a reply to the response on January 27, 2010.

Raycom and HITV have requested confidential treatment of the following information contained in the several agreements:

- (1) Section 12.2(a) of the Asset Exchange Agreement that sets forth a monetary ceiling to indemnification;
- (2) Section 1 of the Term Loan Note governing interest rates and limits to any annual increase in the interest rate;
- (3) Section 3 of the Term Loan Note governing annual principal payments.
- (4) Section 6 of the Term Loan Note governing prepayment of principal;
- (5) Sections 8(b)(2), 8(b)(6) and 8(b)(7) of the Term Loan Note governing limits on indebtedness, dividends and transfers, respectively;
- (6) Section 12(k) and (l) of the Term Loan Note defining “Event of Default” and “Excess Cash Flow;”
- (7) The exercise price, and definition of “Excess Decommissioning Costs,” contained in the Purchase Option Agreement;
- (8) Schedule 3 to the Shared Services Agreement that defines “Services Fee;”
- (9) Schedule 2 to the Studio Lease that defines “Lease Fee and Other Consideration;”
- (10) Section 4 to the Management Services Agreement that sets a limit on the fees payable to Raycom from KHNL/KFVE, LLC;
- (11) Schedule B to the Management Services Agreement that defines “Fees;”
- (12) Section 2.12 and Exhibit A to the Amended and Restated Limited Liability Company Agreement, which includes the monetary value and capitalization of KHNL/KFVE, LLC; and

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<sup>3</sup> FOIA Request at ¶ 3.

<sup>4</sup> 47 C.F.R. § 0.461(d)(3).

(13) Consideration for assignment of the Purchase Option Agreement to Ottumwa Media Holdings, LLC.

Unexecuted versions of the Purchase Option Agreement, Shared Services Agreement, Studio Lease, Management Services Agreement, and Amended and Restated Limited Liability Company Agreement of KHNL/KFVE, LLC, were attached to the Asset Exchange Agreement as exhibits. It was unclear from the language of the initial FOIA Request whether Mr. Daysog sought inspection of Shared Services Agreement, Studio Lease, Management Services Agreement or Amended and Restated Limited Liability Company Agreement. In his reply to Raycom's and HITV's response, however, Mr. Daysog states that the "so-called shared services agreement merges the news operations of three of Hawaii's five largest stations."<sup>5</sup> Given the language in Mr. Daysog's Reply, and Media Council's general opposition to Raycom's and HITV's confidentiality request, we will rule on the confidentiality of all the provisions at issue in these agreements.

Raycom and HITV contend that the information sought is exempt from disclosure under FOIA Exemption 4 because disclosure would allow competitors to have "access to heretofore-non-public information regarding competitively-sensitive commercial terms and conditions reflecting the value accorded by the [parties] to services and other elements of a complex, multi-part commercial transaction."<sup>6</sup> Raycom and HITV maintain that release of the information would prejudice "HITV and Raycom in their respective future business negotiations with respect to the acquisition of programming assets and technical and other services, as well as the provision or acquisition of credit,"<sup>7</sup> and would also adversely affect Raycom's competitive position in the national television market. Raycom and HITV cite prior cases where the Commission has found business strategies and marketing plans, as well as capital expenditures, expenses, equipment leases and outstanding loans, to be subject to FOIA Exemption 4.<sup>8</sup> Raycom and HITV argue that Mr. Daysog has provided no public interest justification for why the information should be disclosed.

Media Council, in its opposition to the request for confidentiality, argues that the public interest mandates disclosure of the information contained in the various agreements.<sup>9</sup> According to Media Council, the information is directly relevant to whether the stations are operating lawfully. Specifically, Media Council argues that in every staff decision addressing shared services agreements and related cooperative agreements similar to those at issue in the instant proceeding, Commission staff has relied on the kind of specific information for which Raycom and HITV seek nondisclosure to determine whether the broker has impermissibly acquired control, and has often released such information in its decision. Media Council maintains that FOIA Exemption 4 is not applicable in this instance because Raycom and HITV have not demonstrated that they face competition for the services provided in the relevant agreements, and have provided only conclusory and generalized explanations as to how release of such information would result in competitive harm. Finally, Media Council argues that the information redacted is not the kind that would cause competitive harm if released.

In his Reply, Mr. Daysog reiterates many of the arguments made by Media Council. He states that the public interest mandates disclosure of the redacted information since the shared services

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<sup>5</sup> Letter from Rick Daysog, Staff Writer, Honolulu Advertiser, to Marlene H. Dortch, Secretary, Federal Communications Commission, dated January 27, 2010, at 1 ("Mr. Daysog's Reply").

<sup>6</sup> Letter from John Griffith Johnson, Jr., Esq., and Jonathan D. Blake, Esq., to Marlene H. Dortch, Secretary, Federal Communications Commission, dated January 19, 2010, at 4 ("FOIA Response").

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* at 5. See *Mercury PCS II, LLC*, FOIA Control No. 98-85, 15 FCC Rcd 14559, 14562 (2000); *AT&T/McCaw Merger Applications*, Protective Order, 9 FCC Rcd 2610, 2616 (Enf. Div. 1994).

<sup>9</sup> Letter from Adrienne Biddings, Esq., Counsel for Media Council Hawai'i, to Marlene H. Dortch, Secretary, Federal Communications Commission, dated December 7, 2009, at 2-4..

agreement has led to a merger of the stations' news operations, has resulted in layoffs of approximately 68 employees at the various stations, and has led to an estimated 2 to 10 percent of station KGMB(TV)'s and KHNL(TV)'s audience losing their CBS and NBC programming. Mr. Daysog cites Media Council's Complaint, and maintains that, with respect to the alleged competitive harm that could result from release of the information, Raycom and HITV have only made "vague arguments that the information requested is 'inherently' sensitive and that the information would enable competitors to devise so-called 'counter-strategies.'"<sup>10</sup> Mr. Daysog maintains that the allegation of competitive harm is unconvincing since both Raycom and HITV have disclosed such information in the past in their filings with the SEC, "the Hawaii Bureau of Conveyances and in annual public disclosures by the companies' investors."<sup>11</sup> Mr. Daysog cites, in particular, the interest rate on an intra-corporate loan between MCG Capital and GMC Television Broadcasting LLC, which ultimately controls KGMB(TV), that was disclosed, according to Mr. Daysog, at least eight times in SEC filings since 2008. Mr. Daysog also cites the disclosure of the specific financial terms of a sale of Raycom's bonds to the Teacher's Retirement System of Alabama.

### Discussion.

Under section 0.459(d)(3), the Commission defers ruling on requests for confidential treatment until a request for inspection has been made pursuant to section 0.461. Mr. Daysog's FOIA request thus requires us to rule on Raycom' and HITV's request for confidential treatment. Section 0.459(d)(2) states that a request for confidential treatment shall only be granted if the submitter shows by a preponderance of evidence that non-disclosure is consistent with FOIA Exemption 4.<sup>12</sup> Under FOIA Exemption 4, agencies may withhold documents obtained from a person that contain trade secrets and commercial and financial information that are privileged or confidential.<sup>13</sup> If the party requesting confidential treatment meets this burden, however, the information may still be disclosed if there is a persuasive showing that the public interest nevertheless supports disclosure of the materials,<sup>14</sup> specifically "when policy considerations in favor of disclosure outweigh those favoring non-disclosure."<sup>15</sup>

We find that Raycom and HITV have not demonstrated that disclosure of the specific items of information (items (1) – (9) and (13), *supra*) for which they claim confidentiality would result in competitive harm. They make only the generalized claim in support of their request for confidential treatment that the disclosure of financial and commercial information would cause competitive harm, which alone is insufficient under section 0.459(c).<sup>16</sup> We find further that even if we concluded that competitive harm would result from disclosure of these nine items, there are exceptionally strong policy considerations that warrant their disclosure. We also conclude that items (10) – (12) are entitled to confidential treatment and that policy considerations do not outweigh the confidentiality of these items.

Commission determinations regarding the permissibility of various cooperative arrangements between in-market broadcasters turn largely on the specific terms of the agreements. Because there is no

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<sup>10</sup> Mr. Daysog's Reply, at 2.

<sup>11</sup> *Id.*

<sup>12</sup> 49 C.F.R. § 0.459(d)(2).

<sup>13</sup> See 5 U.S.C. § 552(b)(4) (authorizing the withholding of "trade secrets and commercial and financial information obtained from a person [that is] privileged or confidential").

<sup>14</sup> *Larry D. Henderson and Robert S. Benz d/b/a Quad Communications*, Memorandum Opinion and Order, 15 FCC Rcd 17073 (2000) (release of confidential information appropriate where the information at issue was used to dispose of complaint and was central to determining whether parties were entitled to use of frequencies); *Capital Reporting Company and Neal R. Gross & Co., Inc.*, Memorandum Opinion and Order, 24 FCC Rcd 12355, 12357-58 (2009) (disclosure of a specific contract price determined to be consistent with the core purpose of the FOIA).

<sup>15</sup> *Larry D. Henderson and Robert S. Benz d/b/a Quad Communications*, 17 FCC Rcd at 17075-76.

<sup>16</sup> 47 C.F.R. § 0.459(c) ("Casual requests . . . which do not comply with the requirements of paragraphs (a) and (b) of this section will not be considered.").

rule that specifies which terms are permissible in such arrangements, it is essential that the public and prospective applicants be able to refer to a coherent body of precedent to guide future transactions. To achieve this goal, the Commission and/or staff typically discloses provision (8), the “Services Fee,” in its orders addressing a shared services agreement.<sup>17</sup> Provisions (7), (9), and (13) are also material factors bearing on control and thus are also typically disclosed. Provision 1, while less commonly discussed, in staff or Commission decisions, may also bear on control and should be disclosed. That the information requested is part of an ongoing complaint proceeding, as opposed to our typical review of an assignment or transfer of control application, is irrelevant in that our determination here will still guide precedent in future cases.

We recognize that, under certain circumstances, FOIA Exemption 4 could reasonably cover loan agreements. We do not believe that is the case here, especially since the principal amount of the Term Loan Note has already been disclosed as part of an SEC filing that itself is publicly available.<sup>18</sup> Mr. Daysog has requested an entire copy of the Term Loan Note, which, of course, includes the principal amount, but also includes critical, redacted terms governing interest rates (2); annual payments (3); prepayment provisions (4); limits on the borrower’s indebtedness, dividends, and transfers (5); and the definition of “Excess Cash Flow” and “Event of Default” (6). These other essential terms of the Term Loan Note are also relevant in determining control, and the principal, together with these other provisions, constitutes, in large part, the consideration for the asset exchange. Therefore, this information, as a matter of public interest, should properly be subject to public inspection.

Though we find that the majority of the redacted information should be subject to public inspection, we do find that some of the sections of the documents sought should be treated confidentially and that this characterization is not outweighed by the public interest in making this information available. As the Commission recently stated in *Johan Karlsen*,<sup>19</sup> “[c]ompetitive harm under FOIA Exemption 4 includes the harm caused by release of detailed financial information such as a company’s assets, liabilities and investments. . . . Acquisition and financing history, business decisions, ownership information, and investment and financing decisions are not confidential.”<sup>20</sup> Based on the record before us, we find that provision (12), which sets forth the monetary value of KHNL/KFVE, LLC, and its capitalization, constitutes the kind of detailed financial information to which the Commission has generally afforded confidential treatment. For the same reason, we find that provisions (10) and (11), which set forth the internal service fees between Raycom and a subsidiary, are not entitled to public inspection. Such items as monetary value, capitalization, and internal service fees cannot accurately be described as either “[a]cquisition or financing history, business decisions, ownership information [or] investment and financial decisions.”<sup>21</sup> These terms, moreover, are not relevant to our determination of control in this case.

Accordingly, IT IS ORDERED that the Freedom of Information Act request for inspection of records filed by Rick Daysog/Honolulu Advertiser on December 9, 2009, and the Request for Confidential Treatment filed by Raycom Media, Inc., and HITV License Subsidiary, Inc., ARE

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<sup>17</sup> See, e.g., *Shareholders of Ackerley Group, Inc.*, Memorandum Opinion and Order, 17 FCC Rcd 10828, 10841 (2002); *Chelsey Broadcasting Co. of Youngstown, LLC*, Memorandum Opinion and Order, 22 FCC Rcd 13905, 13909 (MB 2007); *Nexstar Broadcasting, Inc.*, Memorandum Opinion and Order, 23 FCC Rcd 3528, 3534 (MB 2008); *CFM Communications, LLC*, Memorandum Opinion and Order, 20 FCC Rcd 9738, 973940 (MB 2005).

<sup>18</sup> Though initially redacted, the principal amount was disclosed in a November 4, 2009, filing with the Securities and Exchange Commission (“SEC”). On November 6, 2009, Raycom and HITV filed a letter disclosing the principal amount of the Term Loan Note. Letter from Jonathan D. Blake, Esq., and John Griffith Johnson, Jr., Esq., to Barbara A. Kreisman, Esq., Chief, Video Division, Media Bureau, dated November 6, 2009.

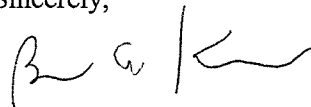
<sup>19</sup> *Johan Karlsen*, 24 FCC Rcd 12299 (2009).

<sup>20</sup> *Id.* at 12301.

<sup>21</sup> *Id.*

GRANTED IN PART AND DENIED IN PART, as set forth above. The undersigned is responsible for the foregoing determination. HITV License Subsidiary, Inc., or Raycom Media, Inc. may file an application for review with the Commission's General Counsel within ten (10) business days after the date of this letter in accordance with section 0.461(i) of the Commission's rules, 47 C.F.R. § 0.461(i). Mr. Daysog may file an application for review with the Commission's General Counsel within 30 days of the date of this letter in accordance with section 0.461(j) of the Commission's rules, *see* 47 C.F.R. § 0.461(j).

Sincerely,

A handwritten signature in black ink, appearing to read 'B A Kreisman', with a vertical line separating the initials from the last name.

Barbara A. Kreisman  
Chief, Video Division  
Media Bureau

cc: FOIA Officer